No. 85-1731 (6)

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

AUTOMOBILE CLUB OF MICHIGAN, AUTO CLUB INSURANCE ASSOCIATION, AUTO CLUB CASUALTY INSURANCE COMPANY, AUTO CLUB GROUP INSURANCE COMPANY, and AUTO CLUB LIFE INSURANCE COMPANY,

*Petitioners.*

*v.*

CLIFFORD ROBERTS, STANLEY SNYDER, FRANCIS DOUGLAS STEVENS, DOUGLAS P. CARLAN, DANIEL PICANO, JOHN ROBBINS and CARL KOLP, On Behalf Of Themselves And On Behalf Of The Class Of All Sales Representatives Of The Defendants in the Counties of Wayne, Macomb and Oakland,

*Respondents.*

## REPLY TO BRIEF IN OPPOSITION

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## REPLY TO BRIEF IN OPPOSITION

Respondents' contend (br., p. 3) that certiorari should be denied because the issue here is "exceedingly narrow" and prior decisions of this Court have "definitively repudiated" petitioners' position. Neither argument is correct.

1. The question presented addresses the effect of the preemption doctrine on what has been rightfully termed "the single most important development in the whole field of labor

law during the past decade."[1] Until very recently, most state courts held that, with few exceptions, private employees could be discharged for any reason or even no reason. Currently, however, in some thirty jurisdictions, this employment at will doctrine has been significantly eroded as the result of state court decisions granting private sector employees protection against unjust discipline under state contract and/or tort law.[2] The magnitude of this change is immense. The sixty million private sector employees who are not covered by collective bargaining agreements[3]—particularly the three million employees discharged for non-economic reasons each year[4]—now have recourse to state courts when they believe that disciplinary or other employer action is unfair. Many of those employees, like the present plaintiffs, have asserted in state court that such action violates implied individual employment contracts.[5]

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[1] *Continuing Modification of Employment-At-Will Doctrine*, 120 LRR 29 (BNA, Sept. 9, 1985), quoting University of Michigan Law School Professor Theodore St. Antoine. *See*, to the same effect, Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80's*, 40 Bus. Law. 1 (Nov. 1984); Baxter and Wohl, *Wrongful Termination Lawsuits: The Employers Finally Win a Few*, 10 Empl. Rel. L.J. 258 (Autumn 1984) ("The emerging doctrine of 'wrongful termination' has been the volatile issue in employment law in recent years"); Sumners, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment At Will*, 52 Fordham L. Rev. 1082 (May 1984) ("One of the potentially significant developments in American labor law in the past decade is the unheralded reemergence of the individual contract of employment as a central legal concept").

[2] *Continuing Modification of Employment-At-Will Doctrine*, *supra*, n. 1, at 30.

[3] *Legislative Proposal On Employment-At-Will Issue*, 115 LRR 44, 45 (BNA, Jan. 16, 1984), quoting outgoing Industrial Relations Research Association President Professor Jack Stieber.

[4] *Id.* at 44.

[5] At least twenty-seven states now recognize the concept of an implied employment contract arising out of, for example, oral statements by an employer representative, an employer document such as an employee handbook, or a pattern of employer conduct. *See*, McCulloch, Townley & Updike, *Termination of Employment*, ¶ 20001-20076 (1986).

Concomitantly, many of these employees have chosen to be represented by a labor organization: in 1984, for example, the NLRB conducted 5,181 representation elections.[6] In the approximate 47% of the elections where unions were successful,[7] negotiations for a collective bargaining agreement then ensued which, because of "recent changes in the collective bargaining climate," often "produced bitter confrontation between labor and management."[8] Both sides, accordingly, resorted to one or more of the bargaining weapons permitted by federal law—a union engaging in a work stoppage or an employer replacing economic strikers, discontinuing strikers' insurance benefits, contracting out struck work or, as here, unilaterally changing employment terms after a good faith impasse. See Pet. for Cert., p. 9.

This case addresses the conflict between these two significant labor trends. It is a recurrent and far-reaching conflict. The issue presented, therefore, is neither "unusual" nor "extraordinary" (br. in opp., p. 4). It is a national problem which, as demonstrated in the petition and supporting *amicus* brief of the United States Chamber of Commerce, will continue to cause both a divergence in federal bargaining rights from state to state and an impermissible state intrusion upon federal labor law.

2. The widespread and recurrent nature of the question presented is also demonstrated by the recent decisions of the Fifth, Sixth and Seventh Circuits discussed in petitioners' supplemental briefs. Contrary to the principles espoused by the court below, those courts held that state or other remedies must yield to the rights and obligations conferred by the National

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[6] *NLRB General Counsel's Summary of Operations for FY 1984*, 118 LRR 121, 123 (BNA, Feb. 18, 1985).

[7] *See*, e.g., NLRB, *NLRB Election Report (Oct. 1984-Mar. 1985)*, ER-280 (Aug. 15, 1985).

[8] *Innovative Approach to Collective Bargaining*, 115 LRR 141 (BNA, Feb. 20, 1984).

Labor Relations Act whether they be the right to unilaterally implement a final offer after a bargaining impasse (*National Metalcrafters, Division of Keystone* v. *McNeil,* 784 F.2d 817 (7th Cir. Feb. 28, 1986)), the obligation to continue to honor existing terms of employment after the expiration of a collective bargaining agreement until there is a bargaining impasse (*U.A. Health and Welfare Education and Pension Funds* v. *Rester Refrigeration Service, Inc.,* ____ F.2d ____, 122 LRRM 2457 (5th Cir. May 23, 1986)), or other action taken pursuant to a collective bargaining relationship (*Serrano* v. *Jones & Laughlin Steel Co.,* ____ F.2d ____, 122 LRRM 2297 (6th Cir. May 8, 1986)).

3. The cases which respondents argue have "definitively repudiated" petitioners' position, *National Licorice* v. *NLRB,* 309 U.S. 350 (1939), and *J.I. Case* v. *NLRB,* 321 U.S. 332 (1943), are not even preemption cases. Moreover, these cases support, not denigrate, the petitioners' contentions. Both cases held that, if employees select a union, their employer may not use pre-union individual contracts to disregard the collective bargaining process. The instant case involves the converse, equally compelling situation: an attempt by employees to use pre-union individual contracts to obviate the bargaining process they have selected. In addition, both cases expressly left unanswered the question of enforceability of the individual contracts.[9] The issue presented was similarly left unresolved by *Belknap* v. *Hale,* 463 U.S. 491, 500 (1983), where, unlike the present case, the plaintiffs were "innocent third parties" who were remediless under federal law.[10] See Pet. for Cert., p. 13.

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[9] In *National Licorice,* the Court stated (309 U.S. at 365): "[w]e do not now consider their [the contracts] nature and extent." In *J.I. Case,* the Court stated (321 U.S. at 336-37): "express or implied individual agreements *may* be held to govern" during the pendency of negotiations (emphasis added). *See* Pet. for Cert., p. 12.

[10] The state enforcement of individual contracts in *Belknap* complemented, rather than frustrated, the federal process. *See* Pet.

*Footnote continued on following page.*

For the foregoing reasons, and the reasons stated in the petition and supplemental briefs, the petition for writ of certiorari should be granted.

Respectfully submitted,

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*Footnote continued from preceding page.*

for Cert., p. 13 n. 15. Enforcement of the individual contracts in *J.D. Alexander* v. *Standard Oil Co.*, 53 Ill. App. 3d 690, 368 N.E.2d 1010 (5th Dist. 1977), a case respondents describe as "related to the questions presented here" (br., p. 5), also complemented the federal process since the employer there, by specifically agreeing at the bargaining table to maintain certain individual agreements, thereby relinquished any right to make changes after the expiration of the collective bargaining agreement.